THE HON'BLE SRI JUSTICE P.S.NARAYANA

Writ Petition No.20581 of 2005

Date : 26-11-2007

Between :

V.Ramana Reddy ..

Petitioner

And

Union of India, represented by
The General Manager,
South Central Railway,
Railnilayam,
Secunderabad
and another ..
Respondents

THE HON'BLE SRI JUSTICE P.S.NARAYANA

Writ Petition No.20581 of 2005

ORDER:-

Heard both the Counsel.

2. The Writ Petition is filed for a Writ of Mandamus declaring the action of the 2nd respondent terminating a nonexistent contract on risk and cost vide his letter No.G/W.148/2005/6380/WA.III dated 26-7-2005 as arbitrary, illegal and against the principles of natural justice and consequently direct the respondents to refund the amounts lying with them under the above tender and pass such other suitable orders.

3. It is stated that *the 2nd respondent has issued a Tender Notice bearing No.53/GTL/2004 on 2-12-2004 for various items/works. Item No.3 of the said notice pertains to supply, stacking and dumping of 50mm guage machine crushed ballast on the track between Km.61.2 and 73.32 between Kalahasthi and Yerpedu station on new down line. In response to the said Tender Notice, the petitioner had submitted his offer on 10-1-2005 for supply and stacking of 50mm machine crushed ballast and the*

tenders were opened on the same day. However, either the 2nd respondent or the Tender Committee constitute to scrutinize and evaluate the tenders did not convey the decision either on the same or within the validity period. As per the practice and convention in vogue the tenders are valid for only ninety days from the date of opening of the tender. Thereafter, if the respondents desired to take some more time to finalise the tenders, it is mandatory to request the tenderers to extend the offer for the necessary period. Further it is averred that the tenders were opened on 10-1-2005 and the validity period expired on 10-4-2005. The 2nd respondent without seeking extension of validity period sent the Acceptance Letter bearing No.G/W/496/TC/South/6380 purported to be dated 1-4-2005. It is also stated that the petitioner had received the said Acceptance Letter only on 11-6-2005, after the expiry of ninety days and also stated that since the petitioner had not received any communication from the respondents within the validity period, he was under the impression that the work was not allotted to him and accordingly, the arrangements made were withdrawn. In terms of the alleged Acceptance Letter the value of the contract was Rs.35,87,000/- and the petitioner was directed to deposit a further sum of Rs.1,51,850/- towards balance Security

Deposit so as to make the Security Deposit which would eventually aggregate to Rs.1,86,850/- including Rs.35,000/- deposited along with the tender. Further it is stated that the Acceptance Letter dated 10-1-2005 is neither binding on the petitioner nor acceptable to him as the same was received by him only on 11-6-2005 long after the expiry of the validity period. After receipt of the said Acceptance Letter, the petitioner had contacted the concerned officer and informed him that he is not inclined to take up the work as the Acceptance Letter was issued after the expiry of the validity period. Notwithstanding the same, the 2nd respondent issued a Seven Days' Notice on 7-6-2005 purported to have been issued under Clause 62 of General Conditions of Contract. By the said Notice, the 2nd respondent threatened to terminate the contract on risk and cost. Further it is also averred that as the Acceptance Letter was issued after the expiry of the validity period the same is not binding on the petitioner and the respondents have no manner of right to initiate any action much less terminate a non-existent contract on risk and cost. Further it is stated that the petitioner had replied to the Acceptance Letter on 15-6-2005 stating that the Acceptance Letter was issued with an antedate after the expiry of the period and received by the petitioner only

on 11-6-2005 and due to increase in seignrioage and due to impending monsoon, he cannot take up the work and also stated that the petitioner had replied to the Seven Days Notice on 21-6-2005 reiterating his stand in his letter dated 15-6-2005. In the said reply in addition to the above reasons, the petitioner had also stated that there is increase in the fuel oils due to which the petitioner is not in a position to take up the work. Notwithstanding the petitioner's reply to the Seven Days' Notice, the 2nd respondent issued a 48 hours' notice on 23-5-2005 threatening to terminate the contract if the petitioner do not start the work within 48 hours from the date of receipt of the said notice. It is also stated that as there was no concluded contract between the petitioner and the respondents, the respondents could not have invoked Clause 62 and threatened him with termination of contract. It is further stated that the petitioner had replied to the forty eight hours' notice on 1-7-2005 inter alia stating that due to increase in seignrioage charges, increase in cost of fuel oils due to which there is an increase in the transport charges and due to onset of monsoon in Kalahasthi Section, the petitioner is not in a position to take up the work and also stated that he had also addressed yet another letter on the same day

reiterating his earlier stand and indicating his willingness to take up the work provided there is increase in the rates. Without adverting to the issues raised by the petitioner in all his letters, the respondents terminated the contract on risk and cost on 26-7-2005 and called for fresh tenders on risk and cost on 1-8-2005. It is also stated that the respondents cannot terminate a non-existent contract that too on risk and cost and further stated that in the first place, the 2nd respondent took inordinate long time to convey his acceptance without seeking extension of validity of tender offered by the petitioner and further it is stated that as per the practice in vogue, whenever there is a delay in finalizing the tenders, the tendering authority invariably seeks the extension of the tender from all the qualified contractors and further stated that in the instant case, no such procedure was followed and that without following the said procedure the respondents conveyed their acceptance long after the expiry of ninety days, which is not binding on the petitioner. Further it is stated that seeking extension of validity of tender is necessary so as to ascertain the opinion of the contractors if they were still prepared to execute the work at the tendered rates even after a long lapse of time. Giving a goby to the established norms and

procedure the respondents are trying to coerce the petitioner from entering into a contract to supply certain quantity of ballast which is financially not viable to the petitioner any more and further stated that he cannot be forced to enter into an agreement in which he had no interest and which has become financially unviable. Further it is stated that the tender of the petitioner was not accepted within ninety days as per practice in vogue, the Acceptance Letter dated 1-4-2005 is not binding on the petitioner and further it is stated that since there is no subsisting contract between the petitioner and the respondents, the General Conditions of Contract are not applicable to a non-existent agreement and the respondents have no right to terminate a non-existent contract that too on risk and cost. In such circumstances, the writ petitioner approached this Court praying for the reliefs specified supra.

4. This Court issued *rule nisi* on 8-12-2005.

5. The respondents 1 and 2 filed counter affidavit, sworn to by the Senior Divisional Engineer/South, S.C.Railway, Guntakal. It is stated that *in response to the Tender Notice No.53/GTL/2004, dt. 2-12-2004 issued by the respondent No.2, the petitioner had filed his tender for the work of "Gudur-Renigunta (Broad Gauge) Section – Proposed supplying and stacking 50mm gauge machine*

crushed hard durable stone ballast of approved quality and dumping the same track at km.61/4 to 73/32 between Kalahasthi and Yerpedu stations (new down line) (8440 cubic meters of ballast)" on 10-1-2005 at the rate of (-) 15% (minus fifteen percent) on the estimated value of Rs.42,20,000/-, which works out to Rs.35,87,000/-. As per the terms and conditions of the Tender Notice and the General Conditions of contract, which is binding on petitioner and the respondents, the offers received on the day of opening of the tenders i.e., 10-1-2005 are valid for a period of 90 days i.e., up to 9-4-2005. The tenders were received on 10-1-2005 and after some official formalities such as verification on offers received by the Finance Department, on 14-3-2005 the meeting of the Tender Committee comprising of Senior Divisional Engineer, South, Guntakal, Senior Divisional Finance Manager, Guntakal and the Senior Divisional Signal and Telecommunications Engineer, Maintenance, Guntakal was held for evaluation of the offers received. The Tender Committee has considered the offer of the petitioner and recommended the same for acceptance of the accepting authority through their Minutes of the Meeting. The Additional Divisional Railway Manager, S.C.Railway, Guntakal, the accepting authority on the

recommendations of the Tender Committee has accepted the offer of the petitioner on 29-3-2005. Based on the recommendations of the Tender Committee followed by the acceptance of the accepting authority, the respondent No.2 has issued Acceptance Letter bearing No.G/W.496/TC/South/6380 dt.1-4-2005, addressed to the petitioner and six others, communicating the acceptance of the offer of the petitioner. As such, the contention of the petitioner that the respondents have not conveyed the decision to him is false since the tenders were finalized and accepted on 29-3-2005 well before the expiry of the 90 days period i.e., 9-4-2005. Further it is stated that in terms of para 3 of the Acceptance Letter the acceptance of the tender will constitute a binding contract between the petitioner and the respondents until a formal agreement is prepared and executed. If the petitioner do not execute the agreement within 7 days of the Acceptance Letter from the respondents or petitioner do not commence the work within 15 days from the date of receipt of Acceptance Letter, the earnest money deposit will be forfeited without prejudice and action will be taken in terms of Clause 62 of General Conditions of contract. Further it is stated that as per the Acceptance Letter, the total security deposit payable is Rs.1,86,850/- and after retaining the Earnest Money Deposit of Rs.35,000/- paid

by the petitioner, the balance Security Deposit payable is Rs.1,51,850/- which petitioner was bound to remit and execute the contract agreement within 7 days from the date of receipt of the Acceptance Letter. The Acceptance Letter dt.1-4-2005 is binding on the petitioner since the Acceptance Letter issued on 1-4-2005 well before the expiry of 90 days period of his offer i.e., 9-4-2005. Further it is stated that the petitioner never consulted the respondent No.2 and informed that he is not inclined to take up the work on treason that the Acceptance Letter was issued after the expiry of the validity period. The petitioner had maintained silence till the receipt of 7 days notice dt.7-6-2005, in terms of Clause 62 of General Conditions of Contract, from the respondents. The first letter from the petitioner was dt.15-6-2005, on receipt of 7 days notice from the respondents stating that he has received the Acceptance Letter on 11-6-2005, the seignorage charges were increased by Rs.12/- from Rs.33/- per cubic meter to Rs.245/- per cubic meter with effect from 1-4-2005, the transportation charges was also increased and monsoon started in Kalahasthi Section and it is difficult to collect the ballast along side the track. It is further stated that the seignorage charges were increased by the State Government of Andhra Pradesh vide

G.O.Ms.No.217, dt.29-9-2004 from Rs.33/- per cubic meter to Rs.45/- per cubic meter with effect from 1-10-2004 and this aspect has been incorporated in the tender schedule very clearly by the respondents vide Clause No.1.3 of General Clauses of specification for track ballast in the tender schedule issued to the petitioner and which has been filed by the petitioner mentioning his rate of (-) 15% on 10-1-2005 the day of opening of the tenders. Hence, the allegation of the petitioner that the seignerage charges are increased with effect from 1-4-2005 is totally false. It is also stated that as regards the another allegation of the petitioner that the transportation charges are increased, the following is the relevant condition:-

> *"Care in submission of tender – 7(a) – Before submitting a tender, the tenderer will be deemed to have satisfied himself by actual inspection of the site and locality of the works, that all conditions liable to the encountered during the execution of the works or taken into account and that the percentage/rates he enters in the tender form is/are adequate and inclusive to accord with the provision in Clause 37 of the General Conditions of Contract for the completion of works to the entire satisfaction of the Engineer."*

It is stated that in view of the above Clause the contention

of the petitioner that the transportation charges are increased is totally untenable and he is bound to execute the work at his quoted rate of (-) 15%. Further it is stated that as regards the plea of the petitioner that monsoon is already started in Kalahasthi Section, the fact is in terms of special condition No.5, of specifications for track ballast incorporated in the Tender Schedule, the petitioner is bound to supply the agreement quantity within the original currency period of 6 months from the date of acceptance. The quarter supply schedule i.e., collection schedule is immaterial of monsoon season. As such, the original currency period of 6 months is inclusive of monsoon and the petitioner cannot escape from his failure to collect the ballast on the plea that monsoon is commenced. It is also stated that the total failure of the petitioner to show adequate progress in proportionate of the time lapsed resulted in issue of 7 days notice dt.7-6-2005 by the respondent No.2. It is also further averred that the respondents are not in receipt of petitioner's letter dt.21-6-2005. The continuous inaction and failure of the petitioner constrained the respondents in issue of 48 hours notice dated 23-6-2005. The respondents are left with no choice than taking action under Clause 62 of General Conditions of Contract as acceptance letter constituted a binding

contract between petitioner. Further it is stated that the respondents have not received any another letter 1-7-2005 from the petitioner stating that he is wiling to take up the work provided there is increase in the rates. The price variation clause, which will enable the respondents to increase or decrease the rates payable to the contractors, is applicable only for the contracts the value of which is Rs.One crore and above. The price variation Clause is not applicable for this contract the value of the contract is onlyrs.35,87,000/-. The respondents are not in receipt of letters dt.14-6-2005 and 21-6-2005 from the petitioner as stated by him in his letter dt.1-7-2005. Further it is stated that the termination of contract work is unavoidable in view of the safety of the passenger and goods and valid in terms of the conditions of the acceptance letter and the General Conditions of Contract. As already stated, the respondents have accepted the offer of the petitioner well within the validity of the offers i.e., 90 days and as such there was no necessity for the respondents to seek extension of validity of the offer of the petitioner. The respondents have not coerced petitioner in any way as he has filed his offer voluntarily. It is also stated that the tender of the petitioner was accepted on the eighty second day i.e., on 1-4-2005 and his tender was valid up to 9-4-2005 and as such the same is binding on the

petitioner. As stated above, the acceptance letter itself constitutes a binding contract between the petitioner and the respondents and as such, the termination of the contract by the respondents is legal and valid. It is also stated that the respondents cannot refund the Earnest Money Deposit of Rs.35,000/- paid by the petitioner as the same is retained towards the risk and cost to be borne by the petitioner. Further it is stated that any amount can be refunded after adjusting the risk and cost amount to be borne by the petitioner and that amount of risk and cost will be known to the respondents only on the finalization of the risk and cost tenders.

6. In the light of the respective stands taken by the parties, since the stand taken by the writ petitioner being a justifiable stand, the respondents are hereby directed to consider the whole issue and take a decision in the light of the specific stand taken by the petitioner relating to the period of 90 days. This Court does hope that the respondents would look into the grievance of the petitioner in proper perspective and take appropriate decision within a period of two months from the date of receipt of a copy of this order.

7. With the above direction, the Writ Petition is disposed of. No order as to costs.

Justice P.S.Narayana

26th November, 2007

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